Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

REPLY BRIEF FOR PETITIONER

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RULE 29.6 LISTING

Sharper Image Corporation has no parent companies or nonwholly owned subsidiaries.

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REPLY BRIEF FOR PETITIONER

I. CERTIORARI SHOULD BE GRANTED BECAUSE FLORIDA ADMITS THAT THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Certiorari is warranted because the Florida Department of Revenue's opposition to the Sharper Image Corporation's ("Sharper Image") petition concedes that the district court of appeal "decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Florida now "acknowledge[s] that, insofar as the district court of appeal indicated that the State need not provide relief to a taxpayer establishing unconstitutional discrimination in a predepri-

vation challenge, its position is inconsistent with the principles set forth in *McKesson* [*Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990)] and *Newsweek* [*v. Florida Department of Revenue*, 118 S. Ct. 904 (1998)]. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994)." Op. Cert. 4-5. Florida further admits that due to "its mistaken reliance on its earlier opinion in *Newsweek*—not yet vacated by this Court—the court of appeal did not fully recognize [its] obligation" to "provide an adequate remedy to taxpayers successfully challenging state taxes on federal constitutional grounds . . . regardless of whether the taxpayers pursue predeprivation or postdeprivation procedures" Op. Cert. 5.[1]

Notwithstanding this confession of error, Florida now contends that review is not warranted because this case is "not of any general importance" since the district court of appeal's decision "is not a decision of the state Supreme Court," "the State, having acknowledged error below, will not be able to assert the decision as controlling authority to deny relief in other suits by taxpayers making constitutional objections," and Sharper Image "is not, in fact entitled to any relief." *See* Op. Cert. 10. Florida's new contentions are without merit.

First, that the decision below is "only [a decision] of an intermediate appellate court" is irrelevant. For purposes of consideration by this Court, the district court of appeal's decision, which the Florida Supreme Court refused to review, is treated as one rendered by "the highest court of a State." *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

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[1] This confession of error dramatically departs from Florida's position in its opposition to Sharper Image's petition for discretionary review by the Florida Supreme Court. *See, e.g.*, Respondent's Brief on Jurisdiction, Fla. S. Ct., at 7 & 9 (contending that this Court's decision in *Newswek* had "no bearing on this case," and that the district court of appeal's decision was "not inconsistent with any decision of the United States Supreme Court on the interpretation of the Due Process Clause.").

Second, that the Department of Revenue has conceded the error of a court below in its opposition is unlikely to change the massive resistance of Florida and its courts to this Court's repeated determinations that states must provide clear, certain, and meaningful remedies to victims of unconstitutionally discriminatory taxation. *See* Pet. 16-17.[2] That resistance is ongoing. Just weeks ago, the Florida Supreme Court reaffirmed a decision this Court had vacated and remanded for reconsideration in light of *Newsweek*. *See Dryden v. Madison County*, No. 87-594, 1999 WL 22612 (Fla. Jan. 21, 1999) (hereinafter "*Dryden II*") (set forth in Appendix A), *reaff'g Dryden v. Madison County*, 696 So.2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998). In so doing, the Florida court again denied a full refund to taxpayers who had successfully challenged special assessments imposed by a county on their property, claiming that this case "could not be more different [from *Newsweek*]—it is not a tax 'remedy' case." App. 5a.

Dryden II represents yet another attempt by Florida to avoid remedying unconstitutionally discriminatory taxation on preposterous grounds. As the dissenting justices in *Dryden II* noted, "[t]his is a tax remedy case" because "the fundamental issue before us in this case continues to be the issue framed by the First District when the case was certified to us, which is whether our decision in *Gulesian v. Dade County Sch. Bd.*, 281 So.2d 325 (Fla. 1973), is still valid after the Supreme Court's decision in *McKesson*. The issue in both *Gulesian* and *McKesson* was whether taxpayers had remedies available after taxing schemes were found to be invalid." App. 7a. The dissenters correctly noted that the majority had "giv[en] the vacation of judgment [by this Court] an empty meaning." App. 7a.

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[2] Even the Department's confession is half-hearted. *See* Op. Cert. 4 ("the State has now acknowledged that *some* of that analysis is in error") (emphasis addedd). This concession hardly provides assurance that Florida will begin providing meaningful relief to victims of discriminatory taxation.

Certiorari is therefore warranted to ensure that Florida respects the rights of injured taxpayers.

The importance of review is further demonstrated by the fact that: (1) courts in other states have denied taxpayers relief on similarly flawed grounds, *see* Pet. 17-18; (2) at least thirteen other states have enacted statutes similar to the one relied upon by the district court of appeal in denying Sharper Image a remedy, *see* Pet. 19; and (3) numerous states, including Florida, continue to grant tax exemptions to newspapers and/or religious publications.[3] This case therefore concerns not just "retroactive relief for years long past." Op. Cert. 8. Rather, the important issues in this case are certain to recur, and are now ripe for decision. *See* Pet. 15.

II. CERTIORARI SHOULD BE GRANTED BECAUSE FLORIDA'S NEWLY MINTED JUSTIFICATIONS FOR DENYING SHARPER IMAGE A REMEDY ARE WITHOUT MERIT.

A. Contrary to Its Advocate's Claims, Florida's Tax Scheme Does Not Discriminate Against Commercial Speech. Florida Discriminates Against All Publications That Are Not Newspapers or Religious.

Having confessed error on the important question of federal law petitioner raises, Florida tries to evade the force of its own confession by changing the subject. Florida now argues, for the first time, that Sharper Image is not

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[3] *See e.g.*, Cal. Rev. & Tax Code §§ 6362.7 & 6362.8 (West 1998) (newspapers and periodicals); Fla. Stat. Ann. § 212.06(9) (West 1998) (religious publications); Ind. Code Ann. § 6-2.5-5-17 (West 1989) (newspapers); Iowa Code Ann. § 422.45(9) (West 1998) (newspapers); La. Rev. Stat. Ann. § 305.14(A)(1) (West 1990) (religious newspapers); Mich. Comp. Laws Ann. § 205.94(n) (1998) (newspapers and periodicals); Neb. Rev. Stat. § 77-2704.07 (1998) (newspapers); Nev. Rev. Stat. § 372.315 (1997) (newspapers); N.J. Stat. Ann. § 54:32B-8.5 (West 1986) (newspapers, magazines, and periodicals); Okla. Stat. Ann. § 1354(1)(A) (West 1992) (newspapers and periodicals); Tex. Tax Code Ann. § 151.319 (West 1992) (newspapers).

entitled to a remedy because Florida's tax laws provide differential treatment based on the "commercial" and "noncommercial" nature of the publications at issue. *See* Op. Cert. 5-10. That is a misrepresentation of what Florida, along with other states, has done.[4]

Florida's tax laws do not give preferential tax treatment to "noncommercial" publications over "commercial" publications. Rather, Florida law exempts "newspapers" and "religious publications" from the use tax, without regard to the "commercial" or "noncommercial" nature of the publications involved. *See* Fla. Stat. Ann. §§ 212.05(1), 212.08(7)(w) (West 1989) & Fla. Stat. Ann. § 212.06(9) (West 1998). A publication carrying only advertisements for such things as apparel for priests, ministers, and rabbis would be both religious and commercial but would, presumably, qualify for the exemption as religious since Florida did not make dispositive a publication's nature as commercial or noncommercial. Thus, whatever analysis might be employed had the Florida legislature distinguished between commercial and noncommercial speakers, that analysis is not applicable here. *See, e.g., H.J. Wilson Co. v. State Tax Comm'n*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998) (holding that catalog publisher's constitutional challenge of newspaper tax exemption did "not challenge a regulation restricting commercial speech but rather . . . a content-based discriminatory sales tax scheme").[5]

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[4] Florida contends that it may defend the judgment below on this ground because it raised the argument in the district court of appeal. *See* Op. Cert. 5 n.4. In the cited portion of its district court of appeal brief, Florida argued that its tax exemptions survive rational basis scrutiny under the Equal Protection Clause, stating that "[t]he difference in the taxation of publications and advertising is legitmate and supportable . . . because the modes of communication are inherently and essentially different." Department of Revenue's Amended Answer Brief, Fla. Dist. Ct. App., at 29. Florida did not, as it suggests, contend that the discriminatory tax exemptions were sustainable under the commercial speech doctrine.

[5] Unlike Florida's tax laws, postal regulations which distinguish between "general publications" and "advertisements," *see* Op. Cert. 7, explicitly classify publications based on the commercial or

Moreover, even if Florida's characterization of its laws were correct, Respondent's newly minted argument would effectively add a new "Question Presented" which was not litigated in the courts below, *i.e.*, whether a state may discriminate against commercial speech in favor of noncommercial speech in granting tax exemptions. This Court has not yet decided whether laws which *discriminate* between commercial speech and noncommercial speech, as opposed to laws which *regulate* commercial speech, should be analyzed under the First Amendment standards applicable to commercial speech, or under those standards applicable to regulations affecting fully protected speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 & n.11 (1993) (noting that the Court was not deciding whether the court of appeals correctly held that "the lesser status of commercial speech is relevant only when its regulation was designed to prevent false or misleading advertising, or to alleviate distinctive adverse effects of the speech at issue"). Thus, if the Court were to deny certiorari on the theory Florida advances, it would allow to stand, for the first time, *sub silentio*, a controversial First Amendment proposition. Florida's new attempted justification, if it had any merit, would provide an additional reason for granting the writ.

B. Sharper Image Has Standing to Raise This Discrimination Claim.

This Court's decisions also make clear that *all* nonbeneficiaries of unconstitutionally discriminatory tax exemptions have standing to challenge such exemptions. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

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noncommercial nature of the publications' content. *See* 39 C.F.R. pt. 3001 subpt. C, App. A. §§ 412.2, 412.4 (1998) (distinguishing between "general publications" and those "designed primarily for advertising purposes"). Similarly, the federal statute governing public broadcasting funding, *see* Op. Cert. 7, explicitly prohibits a public broadcast station from "mak[ing] its facilities available to any person for the broadcasting of any advertisement." 47 U.S.C. § 399b(b)(2).

221 (1987), for example, the publisher of a general interest magazine challenged as violative of the First and Fourteenth Amendments Arkansas' sales tax exemption for newspapers and religious, professional, trade, and sports journals. *See* 481 U.S. at 221. This Court reversed the Arkansas Supreme Court's holding that the magazine lacked standing to challenge the exemptions because "[i]t would avail [appellant] nothing if it wins its argument. . . ." *Id.* at 226. Instead, the Court said:

> We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge. . . . Contrary to the Commissioner's assertion, appellant has alleged sufficient a personal stake in the outcome of this litigation. "The holding of the Arkansas court stands as a total bar to appellant's relief; its constitutional attack holds the only promise of escape from the burden that derives from the challenged statute."

Id. at 227 (alterations omitted) (quoting *Orr v. Orr*, 440 U.S. 268, 273 (1979)); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (rejecting as "misguided" and inconsistent with *Arkansas Writers' Project* Texas's argument that the publisher of a general interest magazine lacked standing to challenge on First Amendment grounds Texas's sales tax exemption for religious publications).

The Court's decisions in *Arkansas Writers' Project* and *Texas Monthly* were not based on the "noncommercial" nature of the publications at issue. Rather, they rested on the fact that unconstitutionally discriminatory tax exemptions "burden[] non-beneficiaries," *see Texas Monthly*, 489 U.S. at 18 n.8, and a "constitutional attack holds the only promise of escape from the burden that derives from the challenged statute," *Arkansas Writers' Project*, 481 U.S. at 227 (internal quotation marks and alterations omitted). Like the nonbeneficiaries in those cases,

Sharper Image has standing to challenge the discriminatory exemptions at issue here.

Also, contrary to Florida's assertion that Sharper Image has no standing to bring a "derivative claim" to vindicate "the rights of third parties," *See* Op. Cert. 8-9, Sharper Image seeks to vindicate its own rights as a taxpayer injured by unconstitutionally discriminatory taxation. *Arkansas Writers' Project* and *Texas Monthly* demonstrate that Sharper Image is within the class of nonbeneficiaries with standing to do so. Moreover, to the extent that any question remains regarding the standing of commercial nonbeneficiaries to challenge unconstitutionally discriminatory tax exemptions, that question is itself independently worthy of this Court's consideration.[6]

Even assuming the commercial speech doctrine were applicable in this case, however, Florida cannot justify its discriminatory taxation with a "bare assertion [of] the 'low value' of commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993). Rather, Florida bears the burden of proving that its differential treatment of commercial speech "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). Florida may not

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[6] Florida's reliance upon *Leathers v. Medlock*, 499 U.S. 439 (1991), *see* Op. Cert. 6, is also misplaced. There, the Court held that Arkansas' sales tax scheme, which exempted newspapers, magazines, and satellite broadcast services, but did not exempt cable television providers, did not violate the First Amendment because, *inter alia*, the exemptions were speaker-based, not content-based like the ones at issue here. *See id.* at 447-49. Indeed, the Florida Supreme Court distinguished *Leathers* on that very ground in striking down Florida's newspaper exemption. *See Department of Revenue v. Magazine Publishers*, 604 So. 2d 459, 462 (striking down Florida's newspaper exemption and holding that, "unlike *Leathers*, the record shows that the content of a publication is a key factor in determining whether the publication is subject to taxation").

meet this burden "by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

Yet, here, Florida has asserted *no* interest, much less a substantial interest, in support of its advocate's assertion of Florida's right to discriminatorily tax commercial speech. It follows that Florida's counsel has not shown that its entirely hypothetical discriminatory taxation of commercial speech would materially advance a substantial state interest in a manner no more extensive than necessary to serve that interest. For these reasons, even if the commercial speech doctrine were applicable in this case, Florida has failed to meet its First Amendment burden of justifying its discriminatory taxation of commercial speech.

CONCLUSION

For the reasons set forth here and in Sharper Image's petition for a writ of certiorari, the petition for a writ of certiorari should be granted. In the alternative, especially given Florida's confession of error, the Court should grant the petition, vacate, and remand the case.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF FLORIDA

No. 87,594

QUINTON DRYDEN *et al.*,
Petitioners,

v.

MADISON COUNTY, FLORIDA,
Respondent.

[January 21, 1999]

CORRECTED OPINION

SHAW, J.

This case is before the Court on remand from the United States Supreme Court for reconsideration of our decision in Dryden v. Madison County, 696 So.2d 728 (Fla. 1997), vacated, 118 S.Ct. 1162 (1998). We reaffirm our decision in Dryden.

1. Facts

The facts are set out fully in this Court's initial opinion on review. See Dryden v. Madison County, 696 So.2d 728 (Fla.1997). Madison County in 1989 adopted several ordinances levying special assessments on property located in the county to pay for garbage services, landfill closure, ambulance service, and fire protection. Several years later, the assesments were declared invalid, and Dryden and other residents sought refunds. The trial court found that the county had acted in good faith in levying the 1989 and 1990 assessments and that Dryden was un-

entitled to a refund for those years. The district court affirmed. We approved the district court decision:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. McKesson Corp. v. Division of Alcoholic Beverages & Tobbaco, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. Gulesian v. Dade County School Board, 281 So.2d 325 (Fla.1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were nondiscriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing these assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden, 696 So.2d 729-30 (footnotes omitted).

The United States Supreme Court subsequently vacated our decision in Dryden in light of its just-released opinion in Newsweek, Inc. v. Florida Dep't of Revenue, 118 S.Ct. 904 (1998). The decision vacating Dryden was brief and without analysis:

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Department of Revenue, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998).

Dryden v. Madison County, 118 S.Ct. 1162 (1998). This Court ordered briefing by the parties concerning the effect of Newsweek on our decision in Dryden, and Dryden now contends that Newsweek mandates a refund. We disagree.

2. Newsweek v. Florida Dep't of Revenue

Newsweek is a tax "remedy" case. This Court in Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (1990),[1] declared unconstitutional a statutory scheme that imposed a sales tax on magazines but not newspapers. Relying on this ruling, Newsweek, a magazine, sought a tax refund, claiming that it had been compelled to pay taxes pursuant to the unconstitutional scheme. The trial court did not reach the merits of the claim but rather granted summary judgment against Newsweek. The district court of appeal affirmed. Newsweek, Inc. v. Department of Revenue, 689 So.2d 361 (Fla. 1st DCA 1997). The district court reasoned that Newsweek should have availed itself of the prepayment remedy under section 72.011, Florida Statutes (1987), which allowed a taxpayer to file suit and pay the contested amount into the court registry rather than to the government. 689 So.2d at 363-64.

The United States Supreme Court granted certiorari and vacated the district court decision, pointing out that a different statutory provision, section 215.26, Florida Statutes (1987), authorized a postponement remedy wherein the taxpayer could pay the tax first and file suit later. The federal Court reasoned:

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[1] This decision was subsequently vacated and remanded and then reaffirmed. See Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (1990), vacated sub nom., Miami Herald Publ'g Co. v. Department of Revenue, 499 U.S. 972 (1991), reaffirmed, 604 So.2d 459 (Fla.1992).

> The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to § 215.26. While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek, 118 S.Ct. at 905. The federal Court concluded that Newsweek was entitled to proceed via the postpayment route and obtain an adjudication on the merits of its refund claim: "Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures [in section 215.26] to adjudicate the merits of its claim." Id. at 905.

3. Application to Present Case

Newsweek is inapplicable to the present case. The United States Supreme Court in Newsweek never reached the merits of the refund issue but rather focused only on the remedy that must be made available to a taxpayer seeking an adjudication on the merits of a refund claim. Specifically, the federal Court held that a taxpayer cannot be cut off from a remedy, or avenue of redress, upon which the taxpayer has reasonably relied. The taxpayer is entitled to proceed upon that avenue and at some point obtain an adjudication—either yea or nay—on the merits of his or her refund claim.

Until the United States Supreme Court stepped in, Newsweek had never obtained an adjudication on the merits of its refund claim. (As noted above, the trial court had granted summary judgment against Newsweek, and the district court had said that Newsweek was not entitled to seek a refund because Newsweek had failed to comply with the statutory prepayment requirements.) The United States Supreme Court vacated the district court judgment and held that Newsweek was entitled to proceed via the

postpayment route and obtain an adjudication on the merits.

The present refund case could not be more different—it is not a tax "remedy" case. In fact, the remedy that Dryden has chosen has never been in issue in these proceedings. Dryden has proceeded via the postpayment route (i.e., he paid the assessments first and then filed suit), and—unlike the situation in Newsweek—the government has not asserted and the courts have not held that he is unentitled to do so. Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where Newsweek left off.

Dryden has pursued his claim to completion at every level. He has obtained an adjudication on the merits from three separate tribunals—the trial court, the district court (twice), and this Court. He ultimately lost at each stage—fair and square.[2] The analysis in Newsweek, which focuses on a taxpayer's remedy for seeking a refund, is inapplicable to this "merits" case. Simply put: The remedy here is not in issue and never has been.

Based on the foregoing we reaffirm our decision in Dryden v. Madison County, 696 So.2d 728 (Fla.1997), in its entirety.

It is so ordered.

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[2] As noted above, this Court in Dryden held that although the special assessments were levied pursuant to a technically invalid ordinance, Dryden was not entitled to a refund for good reason: (1) the assessments were nondiscriminatory, i.e., they applied across the board to all property owners; (2) the assessments conferred a commensurate benefit on the taxpayers, i.e., in return for the assessments, the taxpayers were provided with garbage collection and disposal, landfill closure, ambulance service, and fire protection; and (3) the assessments were enacted in good faith.

HARDING, C.J., ANSTEAD, J., and KOGAN, Senior Justice, concur.

WELLS, J., dissents with an opinion, in which PARIENTE, J., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

I dissent because the majority errs in concluding that the United States Supreme Court's vacation of this Court's judgment in this cause and remand to us for further consideration in light of Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998), should have no impact upon our decision in this case.

My reading of the Newsweek decision finds two clear statements by the United States Supreme Court which, when applied to this case, require rescinding the remanded judgment and opinion of this court. In the first statement, the Court noted with approval the Florida First District Court of Appeal's acknowledgment of the requirement of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), that there be a " 'meaningful backward-looking relief' when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality." Newsweek, 118 S.Ct. at 904. In the second statement, the Court held that:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.
>
> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim.

Newsweek, 118 S.Ct. at 905.

Newsweek reinforces the fact that when the state or a state-authorized taxing unit subjects a taxpayer to an unauthorized payment, McKesson requires either (1) a "predeprivation process" authorizing taxpayers to challenge the validity of a payment prior to making the payment, or (2) postpayment "meaningful relief." If no prepayment procedure exists, as in this case, then postpayment "meaningful relief" must include a refund if the taxpayer has a meritorious claim. It is an inescapable fact that the act of refunding money to the taxpayer is what makes the relief meaningful.

The majority gives the vacation of the judgment an empty meaning by asserting that:

> [This] is not a tax "remedy" case. . . . Dryden has proceeded via the postpayment route. . . . Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where Newsweek left off.

Majority op. at 4.

This is a tax remedy case. The fundamental issue before us in this case continues to be the issue framed by the First District when the case was certified to us, which is whether our decision in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla.1973), is still valid after the Supreme Court's decision in McKesson. The issue in both Gulesian and McKesson was whether taxpayers had remedies available after taxing schemes were found to be invalid.[3] In Gulesian, we held that although a re-

[3] In McKesson, the only reason a refund was not specifically ordered was that the challenged liquor tax was not found to be invalid in its entirety but rather was invalid only insofar as it operated in a manner that discriminated against interstate commerce. Therefore, the Supreme Court allowed either a refund or other

fund to taxpayers would be the normal remedy after a tax was invalidated, an exception was warranted under the facts of Gulesian and thus the refund remedy was not available in that case. In McKesson, the United States Supreme Court held that a postpayment remedy was mandatory in a situation in which no prepayment procedure existed and that remedy had to be a refund or its equivalent. McKesson specifically states:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in [Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912)], or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in [Ward v. Board of County Commissioners, 253 U.S. 17 (1920); and Carpenter v. Shaw, 280 U.S. 363 (1930)], no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added) (quoting Ward, 253 U.S. at 24).

The Supreme Court made this patent in McKesson by citing to its earlier decision regarding a tax on certain Indian tribe lands in Ward v. Board of County Commissioners, 253 U.S. 17 (1920):

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retroactive relief that would cure the discriminaton. McKesson, 496 U.S. at 51. In this case, the assessments were held to be null and void based on the county's failure to substantially comply with the statutory authority under which it purported to act. See Madison County v. Foxx, 636 So.2d 39, 48 (Fla. 1st DCA 1994).

We explained the State's duty to remit the tax as follows:

> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State."

McKesson, 496 U.S. at 33-34 (quoting Ward, 253 U.S. at 24). Applying this rule to the remand of this case requires the conclusion that not only is this a tax remedy case but that the tax remedy must include a refund.

The United States Supreme Court asks us to reconsider this case in light of Newsweek, which reiterates the McKesson due-process requirement that a taxpayer who has only the availability of a postpayment refund, as did Dryden, should receive the "clear and certain remedy" of "meaningful backward-looking relief." In McKesson, the Supreme Court expressly rejected equitable exceptions to the refund requirement. McKesson at 46-47. In Newsweek, the Court did not mention any good-faith equitable exception. This substantiates my serious reservations as to the continued vitality of Gulesian under any circumstances. I believe the correct answer to the First District's certified question is that the Gulesian exception is not still valid. However, even though the question certified to us by the First District is as to the continued viability of the Gulesian exception after the McKesson decision, we do not have to reach that issue to decide whether refunds are required in this case. Rather, I believe the following from my dissent in this case could be adopted:

> Moreover, although neither McKesson II nor Kuhnlein specifically overruled Gulesian, the continuing vitality of Gulesian in light of these decisions is ques-

tionable. Nevertheless, even if Gulesian is still good law, I do not believe the very limited exception afforded by Gulesian to be applicable here. The evidence in this case does not establish that the County acted within the "good faith" parameters of Gulesian. In Gulesian, this Court upheld a trial court's ruling that equitable considerations precluded refunds of taxes based on a presumptively valid statute which was later ruled unconstitutional. The Court gave two reasons for its decision: ordering a refund in the small amounts that would be required would impose an intolerable burden on the school board; and the school board acted in good faith in relying on a presumptively valid statute and to impose a refund would compound the school board's fiscal problems. However, the particularly persuasive fact was that the taxing authority relied upon a presumptively valid statute which had been so held by a trial court but later reversed by the appellate court. This point was recognized in Coe v. Broward County, 358 So.2d 214, 215-16 (Fla. 4th DCA 1978), in which the court noted that Gulesian had carved out a very narrow exception to the taxpayer's right to a refund and that good faith was clearly evident in Gulesian because the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature.

Unlike the taxing authority in Gulesian, the County did not act in reliance on a state statute caught up in a reversed court interpretation as to its constitutionality. Rather, the County failed to comply with the precise statute it relied upon in enacting its ordinances. Although the County drafted its ordinances and levied assessments based upon advice from various sources, a government with the power to exact property from its citizens clearly should be held to a standard that it will know and follow the law. Perhaps those who gave the County the erroneous advice

> concerning the adoption of the ordinances should have the ultimate responsibility, but those who paid under the threat of the County's power to exact the payment should not be held to have no recourse against the unlawful exaction.
>
> The facts presented in this case are simply so different from what occurred in Gulesian that it is erroneous to apply the good-faith exception of Gulesian. See McKesson II, 496 U.S. at 46-47 (state's reliance on statute similar to one found unconstitutional several years earlier precluded state's reliance on an equitable justification to avoid affording relief).

Dryden v. Madison County, 696 So.2d at 728, 732-33 (Fla.1997) (Wells, J., dissenting) (citations and footnote omitted). Since this case is so different factually from Gulesian, we could leave to another day the issue of whether a case resembling Gulesian allows for the application of a Gulesian exception to "meaningful relief," including a refund.

In this case, however, we plainly are in error if we continue to ignore, as the majority does, just how patently discriminatory and inequitable the refusal to refund the payment is in this case. The Madison County assessments were treated identically to ad valorem taxes insofar as collection was concerned. No prepayment mechanism existed for challenging the assessments. If assessments were not paid, liens attached to the property owners' real property, and upon becoming delinquent, the amount of the liens accrued interest at eighteen percent per annum. Nonpayment resulted in the sale of tax assessment certificates.

Precisely contrary to the majority's assertion in its footnote 2, the assessments did not apply across the board to all property owners in this case. Approximately one-half of the property owners in Madison County did not pay the assessments, and liens attached to their properties.

Subsequently, the County canceled the liens by purchasing all assessment certificates sold to third parties for non-payment. In reality, the property owners who did not pay, and thus failed to comply with the law, never had to pay. On the other hand, the property owners who complied with the law, which was later found to be invalid, were the only property owners who had to pay.

Finally, I point out that Judge Davis, in her concurring opinion in the First District's Newsweek decision, cited Dryden v. Madison County, 672 So.2d 840, 843 (Fla. 1st DCA 1996), as a basis for the First District's refusal to provide a refund to Newsweek. Newsweek, Inc. v. Department of Revenue, 689 So.2d 361, 364 (Fla. 1st DCA 1997) (Davis, J., concurring). Judge Davis pointed to the First District's reasoning in Dryden that Gulesian equitable considerations were a basis for denying refunds to Dryden and suggested that this same reasoning should support the denial of refunds in Newsweek. Id. Not only did the United States Supreme Court refuse to accept the Dryden analogy as a reason for denying "meaningful post-payment relief" in Newsweek, but the Court also vacated our judgment in Dryden on the basis of its reversal of the First District's Newsweek decision.

PARIENTE, J., and OVERTON, Senior Justice, concur.